1978

Steve Eliason And Marilyn Eliason Husband & Wife v. Richard C. Watts : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

* * * * * *

STEVE ELIASON and MARILYN ELIASON husband & wife,

Plaintiffs and Appellees,

vs.

RICHARD C. WATTS

Defendant and Appellant

No. 16482

* * * * * *

APPELLANT'S BRIEF

* * * * * *

APPEAL FROM THE JUDGMENT OF THE 1st DISTRICT COURT FOR CACHE COUNTY
HON. VENOY CHRISTOFFERSON, JUDGE

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NATURE OF THE CASE

This action arises out of an Earnest Money Receipt and Offer to Purchase which the Appellant sought to rescind prior to its completion because of significant omissions in the contract.

DISPOSITION IN LOWER COURT

The case was tried to the court. It granted specific relief for the Appellees plus a specified amount for rental value of the unimproved land; and attorney's fees and costs. The court denied all other claims of the Appellees.

RELIEF SOUGHT ON APPEAL

Appellant herein seeks a reversal of the lower court, declaring the contract not specifically enforceable. The award of damages and attorney's fees also sought is to be reversed as inappropriate in an unenforceable contract. In the alternative, Appellant seeks to have any damages awarded to Appellees limited to actual damages, with rents and profits denied. Or if rents and profits are allowed, Appellant seeks such to be offset by the purchase price Appellees had the use of during the interim.

STATEMENT OF THE FACTS

The Appellant, Richard C. Watts, was a partner to John A. Kerr in K. W. Development. They acquired property near 18th North and Main in North Logan, Utah, as partnership property in April of 1976.

Appelants had purchased the subject property from the Greater Logan Development Company. It had been listed by the

latter for 1974, 1975 and was finally purchased by Appellant in 1976. May 25th Transcript at 65.

A few months thereafter, John Kerr was approached by Sherma Fife, a co-employee at Sierra West Real Estate, to see whether he would be interested in selling the property. Kerr indicated he would be.

Fife, was the liason for the preliminary negotiations. The Appellants had determined to sell the property at an earlier date, but their offer had been rejected by Appellee because one of the conditions of the sale was that Appellant Watts build the building thereon. June 15 Transcript at 7.

After some negotiations the parties signed the "Earnest Money Receipt and Offer to Purchase". Within a few days after this took place, Watts, for the first time, reviewed the document carefully. In doing so he discovered that several significant elements of the contract were left blank and that the land descriptions were vague. Record at 3. Some of the major problems he noted were: (1) Lines 5-6 gave the property description asapproximate, with no legal description being given; it also indicated size by inches instead of feet. (2) On Line 20 there was no date given wherein the balance of the purchase price would be payable. May 24th Transcript at 77. (3) Line 25 stated that carpeting and its installation were to be given as part of the purchase price. The contract said the Sellers had agreed to accept them as bid, but as yet no bid had been talked about or agreed upon. (4) Lines 33-34 listed Special Improvements. There was nothing written therein indicating or relieving the Seller's from responsibility for such improvements.

(5) On Line 37 no date was given as to when the option would terminate, leaving the Sellers subject to whatever time period the other party desired to exercise or not exercise the option. (6) On Line 50 the amount of the commission the Sellers were to pay the real estate agent was not given. (7) In the blank immediately following the signatures of the sellers and purchasers, an option was given as to that land "immediately behind approximately 208' x 165'. Record at 3. Thus, the description of the option land was relyin on the description of the property which was the main subject matter. And since the latter was vague so too was the option.

After checking with other persons knowledgeable with the development of land in this area, Watts notified Kerr that the property could not be sold under this contract, with all its problems. And because of these difficulties, and other additional ones connected with the development of the property in this area he did not wish to negotiate the sale any further so the land could not be sold. Notice of this termination was immediately given to Sherma Fife who in turn notified the Appellees.

The purchase price of the subject property and with an option on the land immediately behind it was $30,000.00. Earnest money of $100.00 had already been given. The balance was to be paid in the form of installed carpeting in three of the homes Appllant Watts was building as part of payment, with the balance presumably to be paid in cash. After receiving notice of Appellant's refusal to continue negotiations,

Eliason offered $29,900.00 in the form of a check to Watts and Kerr through the Sierra West real estate office. This offer was refused.

The Appellees thereafter filed an action seeking either specific performance of the contract or in the alternative, damages for breach of contract. Record at 1. Several months prior to the original trial date, the Appellees changed attorneys. Their new counsel filed an amended complaint seeking specific performance and damages incident to specific performance, but dismissed any action for damages for alleged breach of contract. Record at 35.

The trial court granted the Appellees' request for specific performance of the Earnest Money Agreement for the subject property and the option. Appellees were also awarded attorney fees and costs of court and rental value for the unimproved land. Record at 196.

ARGUMENT

POINT I. THE TRIAL COURT WAS CLEARLY ERRONEOUS IN GRANTING SPECIFIC PERFORMANCE OF AN AGREEMENT WHERE THE PREREQUISITES FOR SUCH REMEDY WERE NOT FULFILLED; I.E., ALL THE TERMS OF THE AGREEMENT WERE NOT CLEAR, NOR WAS THE CONTRACT FREE FROM DOUBT, VAGUENESS, AND AMBIGUITY.

The leading case in Utah outlining the elements necessary to decree the remedy of specific enforcement is Pitcher v. 18 Utah 2d 368, 423 P.2d 491 (1967). In that Cache Valley neither party repudiated the earnest money contract nor did they seek its consumation by the specified date. Because of their mutual abandonment, the lower court refused specific performance.

The Utah Supreme Court affirmed this judgment and went on to state that even without a finding of abandonment, specific performance should not be given. Their rationale was: "Specific performance cannot be required unless all terms of the agreement are clear. The court cannot compel the performance of a contract which the parties did not mutually agree upon." Id. at 493. The court quoted Am. Jur. on Specific Performance when they stated: "The contract must be free from doubt, vagueness, and ambiguity, so as to leave nothing to conjecture or to be supplied by the court. It must be sufficiently certain and definable in its terms to leave no reasonable doubt as to what the parties intended, ... A greater degree of certainty is required for specific performa in equity than is necessary to establish a contract as the basis of an action at law for damages." Id. at 493 (emphasis added).

The Earnest Money Receipt and Offer to Purchase had several substantial and material ambiguities and omissions which rendered it incapable of being of sufficient certainty to compel an action for specific enforcement. Some of these problems were:

1. The street address given on line five was an approximate, not actual one. It was also incorrect in that it describes the property on the other side of the road.

2. The dimensions given on line five were given in inches, not feet and actually described a much smaller parcel of property than Appellees intended to buy.

3. Line six was confusing. The property, by actual legal description should have been called the third lot North rather than "#3 lot."

4. The actual legal description was not given.

5. Line 20 gave no closing date for the payment of th balance of the purchase price.

6. Line 21 made the offer subject to the Buyer's obtaining a septic tank permit. The Buyer never received one or even applied for one prior to bringing this suit for specific performance.

7. Part of the consideration for the contract was listed on line twenty-five as Seller's acceptance of carpet and installation as bid. No bid had been made at the time of this offer. This material element was to be the subject of future negotiation between the parties. Deposition of Eliason 16-17; and June 15 Transcript at 104.

8. Lines thirty-three and thirty-four listed special improvements to be made prior to the sale. These were not marked yes or no, but were left blank. This made the Selle liability and responsibility with regard to these factors unclear. May 24th Transcript at 39.

9. The name of the buyer of the deed as provided on line thirty-six was left blank.

10. The date when the offer would close was left blan on line thirty-seven. This could mean the Sellers were subject to a continuing offer of their land, or such might be limited to a reasonable period of time by law. In eithe

event, the date the Sellers' offer would expire was not specified.

11. The commission that the Sellers were to pay the real estate agent was not specified on line forty-nine.

Some of these omissions and ambiguities relate to material provisions of the contract. Viewing the agreement as a whole, it cannot be said that it is so free from doubt, vagueness and ambiguity as "to leave no reasonable doubt as to what the parties intended." Id. at 493.

MATERIAL OMISSIONS MAKE THE AGREEMENT UNENFORCEABLE.

The offer provided for $100.00 down with the "balance" to be paid on delivery of the deed, but no date was given for such delivery. This element alone left the agreement too vague for specific enforcement. In the case of Bryant v. Clark, 347 S.W.2d 635 (Tex. 1961), aff'd, 163 Tex. 596, 358 S.W.2d 614, (1962) a land sale contract provided for $2,000.00 down and the balance in 15 annual installments. Both the trial court and the court of civil appeals refused to specifically enforce this contract because it did not specify the time or conditions of such payments. The court held: "The time of payment of the balance of the purchase money is a material part of the contract, this time was not fixed and the contract incomplete for which reason it cannot be specifically enforced." Id. at 638.

That court refused to infer a time even though the contract provided for "annual" installments. Such should be the case here. For although the Earnest Money Agreement in

the case at bar provided for $100.00 down payment, the date the balance was to be paid was unspecified. In addition, carpet and installation were to serve as part of this price, with no proportion given to the cash to be paid or the value of carpet. The only specification on the carpet at the time of the contract was that it was to be "as bid". Record at 3. And no written bid had been made. Since the manner and time of payment were not fixed, the offer cannot be specifically enforced.

With regard to the payment to be made in cash and carpeting, Sweeting v. Campell, 8 Ill. 2d 54, 132 N.E.2d 523 (1956), provides insight into contracts wherein the considerat is other than cash. In Sweeting, the court denied specific performance of a contract subject to mortgages where it failed to specify a maturity date for either the first or second mortgage mentioned. The court held:

> Though a contract in writing to convey real estate may clearly and definitely describe the property agreed to be conveyed [which the case at bar does not], it cannot be specifically enforced if it does not give an absolute right to a conveyance without further negotiation thereon. . . . [h]e [the purchaser] will not be entitled to a specific performance though he offered to pay the entire purchase price in cash, as the contract provides for the taking of mortgages, and the court will not make a real contract for the parties though a cash payment may be considered more beneficial to the vendor.

Id. at 525 (inserts added).

In the case at bar, Appellees tendered cash prior to seeking specific performance. This is not in accordance with the contract provisions. It calls for carpeting and installation with the balance presumably in cash. And a

court of equity will not make a real contract for the parties and then specifically enforce such. Clearly the lower court erred in granting such a remedy.

As was stated in the case of Dickey v. Pattison, 92 Cal. App. 2d 659, 207 P.2d 1081 (1949), a court of equity will not specifically enforce an agreement in "the absence of clear, unmistakable proof of all the essential terms of a contract. . . . The statement of its purposes in all particulars must be clear, definite and precise." Id. at 1083. The indefiniteness of many of the provisions of this agreement certainly does not lend itself to being called a clear, precise contract capable of specific enforcement.

POINT II. THE LOWER COURT ERRED IN ADMITTING PAROL EVIDENCE OF THE LAND DESCRIPTION, WHEN SUCH EVIDENCE WAS NOT INTRODUCED TO APPLY BUT RATHER TO SUPPLY THE VAGUE DESCRIPTION GIVEN.

The parol evidence rule in land sale contracts was given in the Utah case of Davison v. Robbins, 30 Utah 2d 338, 517 P.2d 1026 (1973). This Court refused to allow parol evidence where the parties to a land sale agreement provided that the legal description of the lands of Stanley and Sons, Inc., of Heber City, Utah, was to be provided thereafter. The Court held:

> Parol evidence is admissible to apply, not to supply, a description of lands in a contract. Parol evidence will not be admitted to complete a defective description or to show the intention with which it was made. Parol evidence may be used for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated,

and supplying a description thereof which they have omitted from the writing.

Id. at 1029.

In the description given of Appellant Watts' and Kerr's land, the Appellees purchased the land across the street, with the size indicated as inches rather than feet. In addition, the description given of the land in the option was "on land immediately behind" the above. Record at 3. No legal description was given. Surely allowing parol evidence in this case had the effect of supplying a descripti and showing the parties intent rather than simply applying the description given in the contract to the land. May 24th Transcript at 30. The admission of this evidence was in violation of the parol evidence rule and such ruling should be reversed. This would leave the court with a defective description of the lands, rendering specific performance unavailable.

Utah's rule regarding parol evidence is similar to those in other jurisdictions. In California, a tract of land to be sold was described only as "real property in the County of Riverside, State of California, viz.: A portion of Lot 2, Trinidad Yorba Tract (approximately 12 acres)." Corona Unified School District of Riverside Co. v. Vejar, 165 Cal. App. 2d 561, 332 P.2d 294 (1959). Although both parties saw and agreed upon the property to be sold, delineat by four corner stakes, the court refused to grant specific performance. As to the admission of parol evidence, the court held: "Parole evidence will not be admitted to help

out a defective description, or to show the intention with which it was made, or to resolve an ambiguity in its terms, ..." Id. at 296.

Certainly the land description given in the case at bar was not sufficiently clear and definite to be capable of enforcement without resort to parol evidence. Parol evidence has been admitted contrary to its purpose. That is, the Appellees used it to define an otherwise vague and ambiguous description, and to show the parties' intent in making it. May 24th Transcript at 24, 25. For example, the parol evidence was not given to apply the "385" x 165", as given in the contract to the land. Rather it was used to correct an otherwise defective description.

Oral testimony is inadmissible under the Statute of Frauds to provide the description of land for conveyance. In order to allow specific performance of a land sale contract it must provide "a description of land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description." Herrman v. Hodin, 58 Wash. 2d 441, 364 P.2d 21, 22 (1961).

Parol evidence was misused in the lower court as it was used to make the contract between the parties sufficiently definite, certain and complete to be specifically enforced. The error of this admission was illustrated in the holding of Meadowlark Investment Corporation v. Croeni, 237 Or. 535, 392 P.2d 327 (1964). It held that evidence of this type can

only apply, not supply a land description. In light of the foregoing, it is evident that the trial court was clearly err in allowing parol evidence as the land descriptions were inde and ambiguous; hence the decree of specific performance based on the parol evidence was in error.

POINT III. WHERE THE CONTRACT PROVIDED FOR CARPET AND INSTAL AS BID, AND NEITHER SUCH BID NOR THE NEGOTIATIONS CONCERNING SUCH HAD AS YET BEEN ENTERED INTO, THIS LEFT A MATERIAL ELEME OF THE CONTRACT OPEN TO FUTURE NEGOTIATIONS AND IT WAS THEREF UNENFORCEABLE BY SPECIFIC PERFORMANCE.

In Willmott v. Giarraputo, 5 N.Y.2d 250, 157 N.E.2d 282 (1959), although the parties to an option contract had descri the property to be sold, given the price to be paid and the a left owing on the purchase-money mortgage, the court held tha this was not sufficient to compel specific performance where the contract provided that the mortgage payment was to be ag upon later.

In the instant case, the carpeting and installation was a substantive part of the contract. In Willmott, the court held "If a material element of a contemplated contract is le for future negotiations, there is no contract enforcible und the statute of frauds or otherwise." Id. at 283.

The court also referred to the lower courts decision, w they affirmed, which said "The written option was unenforcib because agreement upon terms of the purchase-money mortgage was left to the future." Id.

The Earnest Money Agreement entered into by the parties in the case at bar left the bid, agreeable to both, to be de in the future. At the time of the signing of the offer, the carpeting and installation which was to be put in three hou

of Appellant Watts had not yet been measured or bid. Deposition of Eliason 16-17. This was a material inducement to the Appellant as he was to benefit substantially from its performance. And yet its discussion and the final offer by the Appellees had not yet begun. This was an important element of the contract left to future negotiations. This left the contract incapable of being specifically performed; directly contrary to the decision of the lower court.

POINT IV. WHERE THE CONTRACT PROVIDED FOR THE SALE OF CERTAIN REALTY SUBJECT TO THE APPELLEES CARPETING THREE OF APPELLANTS' HOUSES PLUS OTHER MONIES, THE APPELLEES' TENDER MADE ALL IN CASH WAS AN ATTEMPT TO CHANGE THIS PROVISION AND VIOLATE THE TERMS OF THE CONTRACT--AND THEREFORE BARRED SPECIFIC PERFORMANCE.

Where the contract called for carpeting plus cash, Appellees were bound to make tender in accordance with the contract provisions. Before a decree of specific performance can be ordered, the Appellees had the burden of proving that they exercised the contract and its option in accordance with its terms. Lincoln Land and Development Co. v. Thompson, 26 Utah 2d 324, 489 P.2d 426 (1971). This they failed to do. As Appellee's stated in the Findings of Fact, they made a "tender of money to the defendant partners". Record at 193 (emphasis added). This was not what the contract provided. The Appellees failed to carry their burden of proof by establishing their tender of the contract price within the prescribed time. As in Lincoln, "It would thus appear that the trial court erroneously granted the decree of specific performance." Id. at 428.

The Appellees could not substitute and remake the contract and then ask the court to specifically enforce it. As the court held in Miller v. Carmody, 152 Colo. 353, 384 P.2d 77 (1963), "[A] full and proper tender to the vendor of the purchase price or other consideration, in accordance with the terms of the instrument, is an essential condition precedent to a suit for specific performance." Id. at 80. The tender offered by Appellees was neither full nor proper, but was an attempt to vary the contract itself.

The court in Miller described those averments which are necessary to a suit for specific performance, none of which were present here. "In summary, in order for Miller to maintain a suit on this option agreement he must have himself first performed, or offered to perform, or shown sufficient excuse for not performing, all of the conditions required of him by the agreement." Id. at 81. Appellees failed to perform in accordance with the contract consideration calling for carpet and cash. They did not even offer to perform such, nor did they attempt or give any excuse for not perform. They did not present sufficient evidence as to their own proper tender to warrant a decree for specific performance.

POINT V. WHERE THE APPELLEES FAILED TO COMPLY WITH ALL THE TERMS OF THE CONTRACT, BUT SOUGHT INSTEAD TO WAIVE CERTAIN CONDITIONS WHICH HAD PROVIDED APPELLANT WITH SUBSTANTIAL BENEFITS UNDER THE AGREEMENT, THE TRIAL COURT'S AWARD OF SPECIFIC PERFORMANCE WAS AN ABUSE OF DISCRETION.

The provision giving carpeting and its installation as well as the Buyer's obtaining a septic tank permit gave substantial benefits to the Appellant and could not properly

be waived by the Appellees in their tender of performance. Appellant was in the process of finishing three houses and the carpeting was an important part of the consideration offered. It had been a significant inducement for their entering into the agreement. Likewise, the Buyer's obtaining a septic tank permit was of benefit to the Seller. The Appellants would thus be assured that the property was not simply to be used for speculation which was important to them since Watts still owned the adjoining property. In addition, the Appellant would know the Appellees were more likely to be satisfied with the land and not seek recission. May 24th Transcript at 66. And finally, the option would be more likely to be exercised because of the availability of the septic tank permit, thus substantially benefitting the Appellant.

The Appellees did not tender the carpeting and its installation nor the septic tank permit in seeking to exercise the contract and option. The court should thus refuse to grant specific performance where the party seeking such substantially failed to fulfill his part of the agreement. The rationale for such a decision is thus:

> The failure or inability or refusal to carry out the terms of the contract at the time when performance is due will ordinarily be grounds for refusing specific performance, since specific performance will not generally be decreed in favor of a party who has himself been in default or who has wilfully violated his part of the contract, whereby the defendant has been deprived of a substantial benefit under it."

Sopcich v. Tangeman, 153 Neb. 506, 45 N.W.2d 478, 482 (1951).

Since the Appellees were in violation of the contract provisi they cannot induce a court of equity to specifically enforce it.

In Sanford v. Breidenbach, 111 Ohio App. 474, 173 N.E.2d 702 (1960), the Seller was to get a septic tank easement for the purchaser. They refused to grant the Seller specific performance since he had not fulfilled this condition. The court found this to be a material element of the contract which was not complete, tendering specific performance unavailable.

> There is nothing in the character of contracts for the sale and purchase of lands, that places it in the power of either party to trifle with the other by violating a contract on his part, and then, at his own convenience, by offering to make compensation, compel a specific performance . . . . If, therefore, a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal.

Id. at 706.

In other words, a party cannot set up a condition, violate it, and then seek specific performance. And yet this is what the Appellees attempted to do.

The case at bar is similar to Lehman v. Williamson, 35 Colo. App. 372, 533 P.2d 63 (1975). It was a contract for the sale of realty, but instead of a septic tank permit, the purchaser made the contract subject to the purchaser's obtaining an easement to drill a well on defendant's property The purchaser sought specific performance without having fulfilled this condition, claiming it was intended solely

for his benefit. The court refused this contention, saying: "Absent a contractual provision to the contrary, a purchaser may not unilaterally waive a condition in a contract for sale of land where the condition is not solely for his benefit, but also benefits the Seller." Id. at 66.

Such is the case at bar. The septic tank permit enhanced the value of the land and added value to the option Appellant held and increased the likelihood of its exercise. In addition, the permit provided an assurance that the land would be developed and not simply held for speculation. This was important to Appellant Watts because he owned adjacent land and the development of the property at issue would increase the value of his land. Thus, it becomes apparent that this condition of a septic tank permit benefitted Appellant and could not be unilaterally waived by the Appellees. Nor were the Appellees entitled to specific performance since they failed to fulfill the requisite conditions.

Appellants notified Appellees of their refusal to go through with the contract within a few days of its signing. Appellees had incurred no expenses in reliance on the agreement prior to this time and were not substantially injured by this non-performance. Appellees had at risk only $100.00 as a down payment; while Appellants reasons for refusing to sell were real and substantial. Since this Court has the advantage of viewing the full transcript without interruption, Appellant prays that this record be reviewed carefully and decided on principles of equity.

POINT VI. IF THIS COURT AFFIRMS THE TRIAL COURT'S DECREE OF SPECIFIC PERFORMANCE, IT SHOULD LIMIT THE AWARD OF DAMAGES IN ADDITION THERETO TO ACTUAL, OUT-OF-POCKET LOSSES SINCE SUCH COMPENSATION IS NOT FOR LEGAL DAMAGES FOR BREACH OF CONTRACT, BUT IS MORE LIKE AN ACCOUNTING.

If this court finds contrary to Appellant and grants specific performance, the proper measure of damages, if any, are granted in addition to specific performance, are out-of-pocket expenditures. This rule was discussed in Bernardini-Stefnowicz Corporation, 29 Md. App. 508, 349 A.2d 287 (1975). Purchasers of homes under construction were delayed from possession because of undue construction length. The parties sought specific performance and the fair market rental value of their homes during the delay. The court granted specific performance, but denied the rental value. The court held:

> The compensation awarded as incident to a decree for specific performance is not for breach of contract and is therefore not legal damages. . . . The result is more like an accounting between the parties than like an assessment of damages. Id. at 291.

The court refused to grant rents and profits which the Appellants sought. They said,

> "In this case, obviously no rents were generated. Neither was the Appellee-developer in the position of reaping benefits as a result of his own admitted wrongdoing . . . . Appellants were certainly and seriously discommoded by the delay in completion of their homes. For that they have been awarded compensation for their forseeable expenditures [not including rent paid for other premises during the interim]."

Id. at 294 (insert added).

In the case at bar no rents were generated during the interim between exercising the option and the lower court's grant of specific performance. The Appellant notified the Appellees through Sherma Fife within a few days of the signing of the agreement, that the partnership would not sell the land. There was no real delay caused by the Appellant as they notified Appellees immediately after discovering the problems in the document. The partnership reaped no benefits during the time in question, nor did they admit of any wrongdoing which the Appellants in Bernardini did. Therefore, any compensation awarded to the Appellees should be limited to their forseeable expenditures. Where Appellant was not in a position to economically benefit from the use of the partnership land during the lawsuit, neither should they be required to pay rents and profits to the Appellees when none were generated.

This same rationale for damages has been used by other courts. In Reis v. Sparks, 547 F.2d 236 (4th Cir. 1976), the Fourth Circuit also treated compensation in addition to specific performance more like an accounting than a legal damages award. And White v. Felkel, 15 Ga. 205, 82 S.E.2d 813 (S.C. 1954), held that only special damages are available in addition to specific performance. That court defined such as "actual and punitive damages". Id. at 814.

The trial court refused the Appellees any punitive damages because they found Appellant's refusal to convey the property "was not willful or malicious". Record at 194. Thus, the Appelles could only recover for any actual damages they might have incurred.

If this court finds specific performance available to the Appellees, any award in excess of that should be limited to the Appellees' actual damages, since the Appellant's partnership was not willful nor malicious, nor did they benefit from any rents and profits on the land during the delay.

The rental valueof the land in question was set at $500. per month during 1976, $600.00 per month during 1977 by the trial court. Record at 195. This award was improper where there was no proof offered by Appellee's as to this issue. The only testimony as to rental value was given by Ronald Ma and it was based on the rental value of the land with a build on it. But the land had no building on it, and the $1300.00 per month figure was not used by the lower court. The lower court erred in estimating rental value of unimproved land whe no proof was offered to that effect. June 15th Transcript at 140.

POINT VII. IF RENTS AND PROFITS ARE DETERMINED TO BE THE PROPER MEASURE OF COMPENSATION IN ADDITION TO SPECIFIC PERFORMANCE, EQUITY COMPELS SUCH AN AWARD TO BE OFFSET BY THE INTEREST ON THE ENTIRE PURCHASE PRICE WHICH THE APPELLEES HAD THE USE OF DURING THE INTERIM.

Equity seeks to do justice. And justice decrees that if one party gets the rents and profits the other makes during the delay in performance, then such should be reduced by the purchase price the successful party has had the use of during the same period. This rule was well stated in Elles v. Mihelis, 60 Cal.2d 206, 384 P.2d 7 (1963). In that case the defendant was awarded rents and profits for the time during which performance of contract had been delayed.

However, this was offset by the interest on the entire purchase price which defendant had had the use of during the interim. The rationale for such was that if a party gets rents and profits and also has the use of the purchase price--interest free--he is actually better off than if there had been timely performance. This the court refused to grant, limiting the award of rents and profits by the amount of interest on the purchase price.

This same rationale was used by the Sixth Circuit in Northeast Theatre Corporation v. Wetsman, 493 F.2d 314 (6th Cir. 1974). That court held: "[P]rofits lost by Northeast Theatre ought to be offset by interest upon the down payment which was retained by Northeast during the breach." Id. at 318. So although the court awarded damages actually suffered during the breach, they also modified such judgment by the money held at interest by the enforcing party during the period of breach.

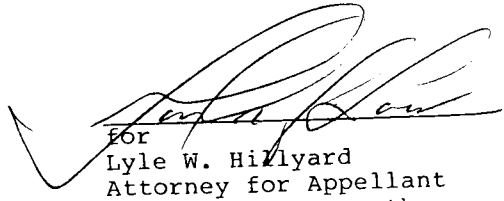
Thus if this court deems rents and profits to be a proper award in addition to specific performance, this compensation should be decreased by the amount of the purchase price held by the Appellees during the interim. Since the partnership was compelled to pay Appellees rents and profits on land which they could neither rent nor profit from; it is only equitable that such award be decreased at least by the interest made by Appellees on the purchase price held during the delay in performance. The testimony of Mr. Fred R. Hunsaker may be used as a basis for interest rates during this period. June 15th Transcript at 120.

CONCLUSION

The Appellant prays that this court reverse the decree of specific performance granted by the lower court. The Earnest Money Agreement was too vague and ambiguous to be suitable for specific enforcement. The conditions prerequisite to its enforcement were not fulfilled by Appellees, nor could they waive them as they were beneficial to the Appellant. And the tender made by Appellees was inadequate and violated the contract terms in its attempt to change its provisions. The Appellant asks the court to declare the agreement null and void and grant damages to the prevailing party.

If, in the alternative, this court finds the lower court's grant of specific performance to be proper, the Appellant prays that any additional compensation be limited to actual damages. Or, in the alternative, if rents and profits are determined to be the proper measure of award, the Appellant seeks to have such offset against the purchase price the Appellees had the use of during the interim.

Respectfully submitted this 30th day of July, 1979, which is uncontradicted.



for
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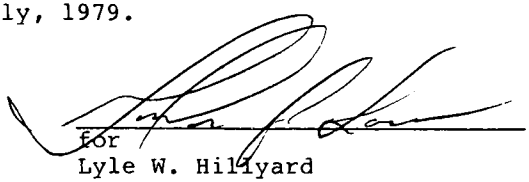
I hereby certify that I hand delivered eleven (11) copies of the foregoing brief of Appellant to the Utah Supreme Court of Utah, two (2) copies to David R. Daines, Attorney for the Plaintiff, this 30th day of July, 1979.



for
Lyle W. Hillyard